

HEARING OFFICER'S REPORT

TO: The Honorable David S. Small
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Delaware City Refining Company, LLC's Application for a Coastal Zone Act Permit for its Ethanol Marketing Project at its Delaware City Refinery, 4550 Wrangle Hill Road, New Castle, New Castle County**

DATE: December 27, 2016

I. PROCEDURAL HISTORY

This Report considers the Record established for the Secretary of the Department of Natural Resources and Environmental Control's ("Department") decision on Delaware City Refining Company, LLC's ("Applicant" or "DCRC") August 19, 2016 Coastal Zone Act¹ ("CZA") permit application ("Application"). The Application seeks a CZA permit for Applicant's Ethanol Marketing Project ("Project"), which proposes to expand the nonconforming use(s) at the Applicant's petroleum refining complex located at 4550 Wrangle Hill Road, New Castle, New Castle County ("Facility") in order to store and ship ethanol to other locations.

The Department's Coastal Zone Act Program ("CZA Program") published public notices of the Application. In addition, the CZA Program requested additional information from the Applicant, which the Applicant provided. The CZA Program also requested comments from the Department's other regulatory programs, and the Division of Air Quality confirmed the proposed air emissions from the two storage tanks, and that the Applicant does not seek any change in the existing permit limits for the existing marine vapor recovery system.

¹ 7 Del. C. Chap. 70.

On September 28, 2016, Secretary David S. Small signed the Secretary's Environmental Assessment Report pursuant to CZA Regulation. The CZA Program provided public notice of the completed Application in the News Journal and New Castle Weekly on October 2 and October 5, 2016, respectively stating that the Department would hold a public hearing on October 28, 2016 at the Department's offices at 391 Lukens Drive, New Castle, New Castle County, which is near the Facility.

I presided over the public hearing, which approximately twenty persons attended, including several persons from the Department and members of the public. The Applicant's representatives present were Tom Godlewski, Environmental Supervisor, and Larry Boyd, Sr. Environmental Engineer. Based upon a request to keep the public comment period open, I granted an extension in the public comment period for written comments until 4:30 p.m. November 4, 2016.

Following the public hearing, the CZA Program provided its Technical Response Memorandum ("TRM"), in which the CZA Program provides its expert review of the Application and its recommendation that the Department issue the CZA permit prepared by the CZA Program.

II. SUMMARY OF THE RECORD²

This Report establishes the following Record: 1) the documents introduced as exhibits at the public hearing and identified below, 2) the verbatim transcript of the public hearing, and 3) the information in this Report and the documents and information identified herein, including the attached CZA Program TRM.

² This summary merely summarizes the Record and does not establish facts.

Attending the public hearing for the Department were former Division Director Phil Cherry, Division of Energy and Climate ("DEC") and Kevin Coyle, AICP CEP, Principal Planner, DEC, who was the CZA Program's representative. In addition, representatives from the Department's Division of Air Quality were present. Mr. Coyle made preliminary remarks that briefly described the Project and submitted the following documents³ from the Department's files, which I summarize below:

DNREC Exhibit 1-The signed Application received on August 19, 2016;

DNREC Exhibit 2-Affidavit of Publication of the public notice of the Application in the August 28, 2016 *The News Journal*;

DNREC Exhibit 3-Affidavit of Publication of the public notice of the Application in the August 31, 2016 *New Castle Weekly*;

DNREC Exhibit 4-Affidavit of Publication of the revised public notice of the Application in the September 4, 2016 *The News Journal*;

DNREC Exhibit 5-September 15, 2016 e-mail from Kevin Coyle, DNREC, to Thomas Godlewski, Delaware City Refining Company, LLC, requesting additional information;

DNREC Exhibit 6-September 21, 2016 e-mail from Larry Boyd, Delaware City Refining Company, LLC, to Secretary David Small responding to Mr. Coyle's request for information;

DNREC Exhibit 7-Secretary's Environmental Assessment Report, signed on September 28, 2016 that determined that the Application is sufficiently complete to provide public notice of it and to hold a public hearing on it;

DNREC Exhibit 8-Affidavit of Publication of the public notice of the Application and the public hearing in the October 2, 2016 *The News Journal*; and

DNREC Exhibit 9-Affidavit of Publication of the public notice of the Application and the public hearing in the October 5, 2016 *New Castle Weekly*.

³ The Department provides documents for the record at the public hearing solely to assist the public in making public comments. The Department does not have a burden of proof to develop a record during the public hearing.

The public hearing sign in sheet is included as DNREC Exhibit 10. Mr. Coyle also provided for the record two written comments the CZA Program received, which I summarize below:

Riverkeeper Ex. 1-Delaware Riverkeeper Network's October 26, 2016 email to Kevin Coyle opposing the Application;

Riverkeeper Ex. 2 Delaware Riverkeeper Network's supplemental October 26, 2016 letter to Kevin Coyle opposing the Application and provided a report on Atlantic Sturgeon.

The Applicant's Larry Boyd made a slide presentation that summarized the Project. Applicant Ex. 1. He indicated that the Applicant proposed to repurpose an existing rail unloading facility to change it from unloading crude oil to unloading denatured ethanol, which he described as ethanol that has gasoline additives in it that makes it unfit for human consumption. He described the United States Environmental Protection Agency's fuel standard, which required the use of renewable fuels, such as ethanol, in gasoline and that since approximately 2006 the Facility has received ethanol by barge and rail. He stated that the Facility uses ethanol to blend into the gasoline products. The Project will add marine loading of ethanol at the piers in order to allow its shipment offsite up to an annual average basis of 10,000 barrels per day. He indicated that the Project would use existing equipment and the Facility currently uses one storage tank for ethanol and a second existing storage tank will be converted for use to store ethanol. He described the marine loading equipment as requiring a short pipe to connect the pier to the existing ethanol pipe on shore. The Project will upgrade a pump to double seals that will reduce leakage and hence emissions. He indicated that the proposed offset entails installing a vapor vacuum control system to better control volatile organic compound

("VOC") emissions from transfers at the Facility's truck marketing terminal. He claimed the offset would more than offset the Project's proposed increase emissions.

He commented that the Facility's piers and the movement of material across them is an existing non-conforming use under the CZA. The Facility has been shipping and receiving materials relating to the petroleum fuel manufacturing and blending since 1957, including ethanol since 2006. He explained the Facility existing storage tank was permitted to emit 0.59 tons per year of VOCs and that the Project would increase this by 0.3 tons. The use of the second storage tank for ethanol would emit 0.8 tons of VOCs annually. Thus, he claimed a total increase of 1.1 tons of VOCs from the Project.

He stated that the piers were regulated by an air permit and controlled by a vapor combustor and that the air permit will not be changed. He described the water and land usage impacts as negligible.

He provided a description of the vapor control system offset to be installed at the truck terminal that should improve vapor recovery during loading of the tanker trucks from its current 98.7% capture efficiency to 100% . He indicated that it would provide 1.5 tons of offset in VOC emissions or more than offset the 1.1 tons that the Project would add. He stated that while the vapor recovery system should provide 100% capture efficiency, for purposes of calculating the offset but the Applicant only used 90% in its calculations to be conservative.

He went on to indicate that the Project would require 20-25 workers during a 18-20 week construction period at a weekly payroll cost of approximately \$110,000, which would produce \$113,000 in state personal income taxes. In addition, he estimated that the purchase of supplies and services would be \$7 million in Delaware.

The following members of the public spoke at the public hearing:

1. Martin Willis spoke in support of the Application, and then asked the Department to consider amending its CZA Regulations. He would like to see the CZA Regulations be changed to increase the re-use of old brownfield sites.
2. Amy Roe spoke as a representative of the Audubon Society and opposed the Application. She first requested a 30-day extension to the public comment period because of her difficulties in obtaining documents under the Freedom of Information Act (“FOIA”). She then set forth reasons for her opposition to any CZA permit for the Project. First, she claimed that the Project is a new bulk products transfer prohibited by the CZA. She cited the CZA’s prohibition against offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971 are prohibited in the Coastal Zone and no permit may be issued therefore. She also stated that converting the existing dock facilities to allow shipment of ethanol is not allowed under CZA Regulation 4.6, which states that conversion or use of existing, unregulated, exempt or permitted docking facilities for the transfer of products. She noted that no ethanol was transferred prior to June 28, 1971, and that ethanol only began to be used at the Facility in 2006. She also commented that the Department approved ethanol shipments to the Facility without any public notice, which she claimed violated the CZA. She commented that the Department and the Applicant allowed crude oil shipments to be made to other locations than allowed in the permit. Ms. Roe stated that the Applicant’s parent corporation informed the public of its plans to ship crude oil to other locations than approved in the Department permit. Finally, she claimed that the Applicant does not own the facilities to be used to store and ship ethanol, but instead an affiliate, PBF Logistics created in 2014 to own facilities, is the owner. Her written statement was marked as Audubon Ex. 1.

3. Bernard August spoke in opposition to the Application. He stated that he was a member of the Audubon Society's conservation committee. He concurred with Ms. Roe's comments.
4. Peggy Shultz spoke as a representative of the League of Women Voters of Delaware in opposition to the Application. She questioned whether the Application should have been determined to be administratively complete because the Application seeks to establish a new bulk products transfer for ethanol. Her written comments were marked as League of Women Voters Ex. 1.
5. Stephanie Herron spoke in opposition to the Application based upon the proposed ethanol shipment that she claimed would violate the CZA as a new bulk products transfer.
6. Coralie Pryde spoke on behalf of the Sierra Club of Delaware in opposition to the Application. She considers the Project to be a new bulk product transfer that the CZA prohibits. She commented on the shipment of ethanol denatured with 2-2.5 % gasoline is not part of the Facility's core business. She mentioned that if the ethanol shipments were proposed from a new facility, then the violation of the CZA would be easy to oppose. She opposed the Application because of the possible adverse impact from spills in the Delaware River. Her written comments were marked as Sierra Club Ex 1.
7. Gail Heuth spoke in opposition to the Application because of her concerns with air pollution from the trains and shipping

Following the public comments, I discussed with the Department's staff about the request to keep the public comment period open. I granted an extension to November 4, 2016, based upon when the transcripts would be available so that the extension would not unduly delay the required CZA permit decision.

Following the public hearing, the Department received the Applicant's presentation (Applicant Ex. 1) and its response to public comments (Applicant Ex. 2), which at the public hearing I had allowed the Applicant to submit.

The Department received the following public comments during the extended public comment period:

1) November 4, 2016 email from Jeanne E. Sadot who included Ms. Roe's statement from the public hearing and opposed the Application on environmental grounds as a 29- year resident of Delaware City. Sadot Ex. 1.

2) Amy Roe submitted a revised and supplemental comment with two appendices that included additional emails on the crude oil shipments from the Facility. Audubon Ex. 2.

The Applicant submitted a November 10, 2016 letter that sought to supplement the Application to reflect higher emissions than presented at the hearing (1.1 tpy as opposed to 0.8 tpy in the Application). Applicant Ex. 3. The CZA Program discussed with the Applicant that the supplement would be considered an amendment consistent with Section 10.2 of CZA Regulation 101, 7 DE Admin. Code 101. In a November 22, 2016 letter, the Applicant withdrew the proposed supplement and explained the different numbers as attributable to a proposed change to use a different storage tank than originally proposed. Applicant Ex. 4. The November 22, 2016 letter re-affirmed that the Application reflected the correct numbers and the proposed use of the original two tanks, identified as Tanks 206 and 225. The letter also provided more detail on the offset, which is a vapor recovery system at the truck terminal that will lower VOC emissions by 26.9 tons per year, of which 1.1 will be used as the offset and the remaining balance 25.8 tons per year available for future use as an offset. This letter also refers to the two pending air permit applications, one for the Project's ethanol marketing equipment changes and

one for the offset component to the Project's truck terminal vapor recovery system. The letter further explained the differences in the two air applications and the Application.

I requested assistance from the Department's CZA experts, who provided the attached Technical Response Memorandum ("TRM"). The TRM recommends issuance of CZA Program's draft permit because the Applicant satisfied the regulatory requirements for a CZA permit. The CZA Program provided a draft CZA permit should the Secretary decide to issue a CZA permit.

III. FINDINGS OF FACT

I find that the above Record supports the issuance of a CZA permit. This finding is based upon the Application, exhibits, testimony, and the CZA Program's TRM.

As a preliminary matter, I find that the Facility is a "nonconforming use," as defined by Section 7002 of the CZA. The Facility's overall nonconforming use could be viewed as including two categories of nonconforming uses, namely, Section 7002's defined "heavy industry use" and potentially "bulk product transfer facilities" ("BPTF"). Whether viewed as a single use or as two uses, I find that these nonconforming use(s) were in operation before the CZA's June 28, 1971 date for determining the existence of a nonconforming use. The Department has recognized the Facility's overall nonconforming use in several CZA permit decisions.

I find that the Application seeks to expand⁴ the nonconforming use(s). The Project's proposed use of two storage tanks, identified as tanks 206 and 225, is an expansion of the heavy industry use because they will store ethanol that will not be blended with gasoline at the Facility.

⁴ CZA Section 7004(a) uses "all expansion or extension nonconforming uses." This Report will use expansion for simplicity without interpreting if an expansion or an extension are different.

Similarly, the Project proposed use of the docks to ship ethanol to other locations as a product is an expansion of the docks' current use, which receives ethanol for use at the Facility. The Applicant proposes to use storage tanks on tax parcel 3B-1-12-008.00-015 and marine loading docks on Parcel 3A-22-003.00-001.

CZA Section 7004(a) allows the Department to grant a CZA permit for expansions of nonconforming uses. The proposed expansion of the storage tanks' use to include ethanol will not entail any new equipment, but the new storage usage of ethanol will increase the Facility's VOC emissions by 0.8 tons annually. The proposed expansion of the docks to allow loading of ethanol onto vessels will require the installation of a new pipe from the loading pier to the existing ethanol pipeline, which the Facility uses to transport ethanol unloaded at the dock to the refinery. Hence, the proposed expansion will add loading of ethanol to marine vessels to the current approved unloading of ethanol. Based upon the limited change to the Coastal Zone, I find that the proposed expansion of these nonconforming uses supported by the record, particularly with the environmental offset that will result in cleaner air in the Coastal Zone than existed prior to the Project's emissions.

The CZA Program reviewed the Application and determined that it provided the necessary information and that the Project's impacts were minor, with only the 0.8 ton per year VOC emission increase from the storage tanks' usage requiring an environmental offset for its negative impact to the Coastal Zone. The Applicant provided 1.1 tons per year in VOC reductions from its truck terminal vapor recovery system improvements, which more than offset the increased emissions. Thus, I find that the Applicant has supported its Application for a CZA permit.

I have considered but find unpersuasive the Applicant's contention that the Project is an unregulated activity that does not require a permit under Section 7004. For the reasons set forth above, I find that the Project does involve an expansion or extension of the conforming use(s) and therefore is subject to the permitting requirements of the CZA.

Turning to the public comments that objected to the Application, I find that they dispute that the Project represents an expansion of a nonconforming use. The commenters claim the Project would be a new BPTF, and, as such, the Department is prohibited from issuing the Project a CZA permit. As discussed above, the Project will not involve any new BPTF. Instead, the Project will use the existing docks and existing storage tanks.

The Project proposes to expand the Facility's nonconforming use by storing and shipping ethanol from the Facility by marine vessel. The storage use would be the same as the storage of the ethanol blend into gasoline products. The shipment use would utilize the existing docks that currently receive ethanol. The CZA should not be interpreted to prohibit such a reasonable expansion of nonconforming uses. To the contrary, in addressing "expansion or extension of nonconforming uses" in Section 7004, the CZA states that they are "allowed only by permit," if the Department is satisfied that the project should be permitted following analysis of six statutory factors set forth in Section 7004(b) and in Regulation 6.3.

Audubon's comments seek to have the Department interpret the CZA to regulate the docks in a manner that would not allow such a reasonable expansion of the use to include the storage and shipment of ethanol consistent with the Facility's current receipt of ethanol at the docks and its storage in tanks. The Audubon interpretation is unreasonable and inconsistent with the plain language of the CZA, its regulations, and precedent construing the CZA. The expansion will allow ethanol already received at the Facility (often unloaded at the docks) to be

shipped from the Facility using the docks. There is no attempt to convert the docks into a general port facility for shipping any type of non-refinery related bulk products. Any denial of a CZA permit for such an expansion of a nonconforming use would be clearly contrary to the dual purpose of the CZA to ensure environmental improvement in the Coastal Zone while at the same time providing industry with the needed flexibility to remain competitive in a global marketplace. CZA Regulations, Preamble, App. C, § 1.1.

Audubon also raised an issue with the ownership of the Facilities tanks and docks. Based upon the Application and the Applicant's response, I find unconvincing the allegations, which even if true, would not change the merits of the Project. The Facility has changed ownership numerous times over the years and such changes are subject to certain filings and Department oversight. The Application represents the best evidence on the ownership, which the Applicant verified in its post hearing submission.

I also reject the Audubon's request to have the Department deny the Application because of allegations that the Applicant shipped crude oil to locations other than DCRC's sister facility in Paulsboro, NJ. This is an issue unrelated to the Application, which is the subject of this proceeding. Audubon's comments also questioned the Department's 2006 status decision on ethanol. Both of these positions raise issues beyond the scope of this proceeding, which is limited to reviewing the Application within the CZA's ninety-day period. I recommend rejecting the comments that seek to deny the Application on the grounds of alleged violations of permits or alleged problems with past decisions as unrelated to the Application and beyond the scope of this proceeding.

IV. Conclusions and Reasons

Accordingly, I conclude that the record supports approval of the Application because it complies with the CZA and the CZA Regulations and supports the requested expansion or extension of use of the Facility's CZA authorized operations. I recommend that the Department adopt the following ordering paragraphs:

1. The Department has jurisdiction and authority to issue a CZA Permit to the Applicant subject to the reasonable permit conditions deemed appropriate and consistent with the CZA's purposes included in the permit prepared by the CZA Program;

2. Ethanol throughput shipped out of DCRC's loading piers, Piers 2 and 3, shall not exceed 10,000 barrels per day on an annual average basis;

3. The Department's findings were made based upon the Record as presented. A change in these factors or the use of the Facility may result in a different determination. As such Applicant should request a Coastal Zone Status Decision if future physical or operational changes are intended or implemented;

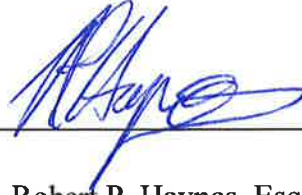
4. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and its regulations;

5. The Department held a public hearing in a manner required by the law and its regulations;

6. The Department considered all timely and relevant public comments in making its determination;

7. The Department carefully has considered all the factors to be considered in making a decision on a CZA permit application under the CZA and its CZA Regulations; and

8. The Department shall publish legal notice of this Order and otherwise provide notice as to all affected persons in a manner consistent with the public notice required by the law and the Department's CZA Regulations, and shall publish the Order on the Department's web site.



Robert P. Haynes, Esquire
Senior Hearing Officer